CHINN SWEE ONN

v.

PUCHONG REALTY SDN. BHD.

SUPREME COURT, KUALA LUMPUR
AJAIB SINGH SCJ
MOHD. AZMI SCJ
HARUN HASHIM SCJ
[CIVIL APPEAL NO. 262 OF 1989]
23 SEPTEMBER 1989

BANKRUPTCY: *Appeal to set aside bankruptcy notice - Judgment creditor accepted payment from third party - Section 42 Contracts Act - Whether entitled to enforce claim against judgment debtor.*

The appellant in this case appealed to set aside a bankruptcy notice which was based on a judgment obtained by the respondents against the appellant by default of appearance in the sum of RM136,114.29 with accumulated interest and costs.

The appellant in his application to set aside the bankruptcy notice denied that he was indebted in the said sum. The appellant also contended that on the mutual understanding and on the judgment creditor's undertaking that they will forbear to levy execution against the appellant if in return the appellant will instruct Hock Hin Leong Sdn. Bhd. to take over the judgment debt and forward to the judgment creditors, the sum of RM2,000 per month and as the judgment creditors have agreed to accept the repayment of the debt from a third party they have lost all their rights of execution of the judgment against the appellant and are therefore not entitled to enforce the judgments against the appellant.

The two main grounds advanced by the appellant were firstly that the sum of RM136,114.29 as stated in the bankruptcy notice was in excess of the actual amount owing by the appellant to the respondents and secondly that under s. 42 of the Contracts Act 1950 the respondents were not entitled to enforce their claim against the appellant but should proceed against Hock Hin Leong Sdn. Bhd. the third party who had agreed to pay the judgment debt to the respondents at the rate of RM2,000 per month.

Held:

[1] By accepting these payments the respondents had impliedly accepted the arrangement for the payment to be made by Hock Hin Leong Sdn. Bhd. to the respondents. Consequently by virtue of s. 42 of the Contracts Act 1950 the respondents are not entitled to enforce their claim against the appellant which would mean that they would not be in a position to execute the judgment against the appellant including the bringing of bankruptcy proceedings.

[2] The respondents were not entitled to enforce the default judgment against the appellant and the consequential execution by way of bankruptcy notice and bankruptcy petition was bad and irregular.

[Appeal allowed with costs. The bankruptcy notice and the bankruptcy petition is set aside.]

Cases referred to:

LYL Hooker Sdn. Bhd. v. Tevanaigam Savisthri d/o K.T. Chitty & Anor. [1987] CLJ (Rep) 179
Haji Nik Ishak bin Haji Nik Daud v. Nik Zainab binti Nik Jaafar [1975] 2 MLJ 82

Legislation referred to:
Contracts Act 1950, s. 42

For the appellant - Chan Kok Keong (D.K.S. Sambathan with him)
For the respondent - John Fam

JUDGMENT

Ajaib Singh SCJ:

This was an appeal by Mr. Chinn Swee Onn a senior member of the Bar practising in Ipoh. He had applied to the High Court at Ipoh to set aside a bankruptcy notice dated 16 March 1987. The bankruptcy notice was based on a judgment obtained by the respondents - Puchong Realty Sdn. Bhd. against the appellant by default of appearance in the sum of RM82,392.50. With accumulated interest thereon and cost this sum had increased to RM136,114.29 when the bankruptcy notice was issued.

The appellant's application to set aside the bankruptcy notice came up for hearing before the learned Judge on 14 June 1988. After hearing submissions from Counsel for the parties the learned Judge deferred his decision for a few days and on 21 June 1988 he dismissed the appellant's applications to set aside the bankruptcy notice. Meanwhile the appellant had also been served with a bankruptcy petition dated 6 August 1987. After dismissing the appellant's application on 21 June 1988 the learned Judge made receiving and adjudication orders against the appellant pursuant to the bankruptcy petition.

In his affidavit in support of his application to set aside the bankruptcy notice Mr. Chinn Swee Onn states *inter alia* as follows:

> I crave leave to refer to the bankruptcy notice dated 16 March 1987 and the creditors petition dated 6 August 1987. The creditors have alleged in both these documents that I am indebted to them in the sum of RM136,114.29. I deny that I am indebted to them in the said sum or any other sum.
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> I further say that the creditors took judgment in default against me in Ipoh High Court civil suit no. 344 of 1983 and Ipoh Sessions Court civil action no. 701 of 1983 for a total of RM102,392.50 on the mutual understanding and on the judgments creditors' undertaking that they will forbear to levy execution against me and in return I will instruct Hock Hin Leong Sdn. Bhd. of No. 73 Jalan Leong Sin Nam, Ipoh to take over the judgments debt and forward to the judgment creditors the sum of RM2000 per month.
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> Relying on their aforesaid agreement and undertaking of the judgment creditors I then authorised Hock Hin Leong Sdn. Bhd. to forward to the creditors the said sum RM2000 per month. A copy of my letter dated 27 May 1985 addressed to Hock Hin Leong Sdn. Bhd. is now shown to me and marked "CSO-1". Since then the judgment creditors have accepted payment from the said Hock Hin Leong Sdn. Bhd. but the total amount received by them is not known to me.
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> As the judgment creditors have agreed to accept the repayment of the debt from a 3rd party they have lost all their rights of execution of the judgments against me and are therefore not entitled to enforce the judgment against me. If payment had not been made by Hock Hin Leong Sdn. Bhd. then they should obtain judgment against the said company.

The letter dated 27 May 1985 exhibited as "CSO-1" in Mr. Chinn Swee Onn's affidavit reads as follows:

Puchong Realty Sdn. Bhd.
1B1-A, 1st Floor
Raayat Building
Jalan Sultan Yussuf
Ipoh

In consideration of your forbearing to levy execution on the decretal amount totalling RM102,392.50 (Ringgit One Hundred and Two Thousand Three Hundred and Ninety Two and Cents Fifty) only in respect of judgments against me in Ipoh High Court civil suit no. 244 of 1983 and in Ipoh Sessions Court No. 701 of 1983 I do hereby instruct Messrs Hock Hin Leong Sdn. Bhd. of No. 73 Jalan Leong Sin Nam, Ipoh to forward to you monthly commencing from May 1985 a sum of RM2000 (Ringgit Two Thousand) only towards payment of the principal sums owing to you under the above suits until the whole of the decretal sums shall have been settled.

Dated this 27 May 1985.

Sgd.
...
Chinn Swee Onn

We agree to the above and undertake to forward to Puchong Realty Sdn. Bhd. the sum of RM2000 monthly until the decretal amounts have been thus paid off.

Sgd
...
Hock Hin Leong Sdn. Bhd.
73 Jalan Leong Sin Nam
Ipoh

Two main grounds were advanced by the appellant before the learned Judge as well as before us. First that the sum of RM136,114.29 as stated in the bankruptcy notice and bankruptcy petition was in excess of the actual amount owing by the appellant to the respondents and secondly that under s. 42 of the Contracts Act 1950 the respondents were not entitled to enforce their claim against the appellant but should proceed against Hock Hin Leong Sdn. Bhd. the third party who had agreed to pay the judgment debt to the respondents at the rate of RM2000 per month pursuant to the appellant's letter dated as follows:

Effect of accepting performance from third person.

42 When promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

During the submission made by the parties before the learned Judge in Ipoh, Counsel for the respondents conceded that the respondents, had received RM10,000 from Hock Hin Leong Sdn. Bhd. and before us on appeal it was conceded by Counsel for the respondents that the respondents had in fact received a total of RM12,000 from Hock Hin Leong Sdn. Bhd. pursuant to the agreement contained in the appellant's letter of 27 May 1985. By accepting these payments the respondents had therefore impliedly accepted the arrangement for the payments to be made by Hock Hin Leong Sdn. Bhd. to the respondents in terms of the letter by the appellant dated 27 May 1985. Consequently we are of the view that by virtue of s. 42 of the Contracts Act 1950 the respondents are not entitled to enforce their claim against the appellant which would mean that they would not be in a position to execute their judgments against the appellant including the bringing of bankruptcy proceedings.

In his grounds of judgment the learned Judge state *inter alia* as follows:

> The first issue to consider is whether Exhibit "CSO-1" is an assignment or a novation. In *LYL Hooker Sdn. Bhd. v. Tevanaigam Savisthri d/o K.T. Chitty & Anor.* [1987] CLJ (Rep) 179 the Supreme Court held that novation was a new contract which extinguished the right and obligation under the old contract for which the new contract was made. Being a new contract, there must be consent of all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which are already extinguished.
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> Exhibit "CSO-1" cannot, in my view, be said to be a new contract between Hock Hin Leong Sdn. Bhd. and the judgment creditor which extinguished the rights and obligations of the old one between the judgment debtor and the judgment creditor. There was no consideration as the judgment creditors made no agreement to forgo the judgment debt and in fact the judgment creditors was not even a party to it. We also do not have sight of how much has been paid by Hock Hin Leong Sdn. Bhd. to the judgment creditor except for Exhibit "CSO-3" which is only a proof of the sending but not the receiving. However, in his submission, Counsel for the judgment creditor had conceded that RM10,000 had been paid by Hock Hin Leong Sdn. Bhd. in 1985 but this was towards the judgments debt for Ipoh Sessions Court Case 701/83 also against the judgments debtor. "CSO-1" could therefore only be an assignment for which the judgments debtor would still be liable if Hock Hin Leong Sdn. Bhd. did not pay as promised. This situation clearly distinguished itself from the facts of the case cited by Counsel for the judgment debtor namely *Haji Nik Ishak bin Haji Nik Daud v. Nik Zainab Binti Nik Jaafar* [1975] 2 MLJ 82 where it was rightly held that since there had been an agreement to performance from a third party, the appellant could not enforce the payments from the respondent.

Exhibit "CSO-3" referred to above is a letter from the appellant's solicitors to the respondents enclosing a cheque for RM2000 issued by Hock Hin Leong Sdn. Bhd. This letter is undated but appears to have received by the respondents on 21 January 1987 as indicated by a stamp mark - Puchong Reality Sdn. Bhd. 21 January 1987 - at the bottom of the letter.

In the case of *Haji Nik Ishak bin Haji Daud v. Nik Zainab Binti Nik Jaafar* (*supra*) it was held by the Federal Court that "as the appellant had agreed to accept performance of the promise from the third person he could not under s. 42 of the Contracts Act 1950 enforce it against the respondent".

The head-note in this case reads as follows:

> In this case the appellant had transferred his land to the respondent and the respondent had transferred her land to the appellant. The appellant's case was that the consideration for the transfer of his land was RM25,000 and that for the respondent's land was RM14,000 thereby leaving a balance of RM11,000 which was agreed to be settled by (a) Nik Hassan RM4,000 and (b) Nik Abdul Majid Yahya RM7,000. Both Nik Hassan and Nik Abdul Majid were the sons of the respondent. Nik Abdul Majid did not settle the sum of RM7,000 as agreed and the appellant thereupon claimed payment from the respondent. His claim was dismissed in the High Court and he appealed to the Federal Court.

In delivering the judgments of the Federal Court Ali FJ said *inter alia* as follows:

> The effect of the said agreement, as it seems to me, is that upon the appellant's acceptance of Nik Abdul Majid's promise to pay or settle the amount RM7,000 the respondent was discharged from liability to pay. The law here, in my view, is the same as in India. I am referring of course to s. 42 of the Contracts (Malay States) Ordinance 1950 which is indentically the same as s. 41 of the Indian Contracts Act. The commentary on the said provision in *Pollock and Mulla*, 9th Edn., at p. 361 seems to suggest that the law in England is different.

It is true that the respondents had obtained two judgments by default of appearance - one in the Sessions Court and one in the High Court - but the letter of 27 May 1985 refers to the total sum obtained by way of default of appearance in both the judgments in the Sessions Court as well as in the High Court so that s. 42 of the Contracts Act applied to the total sum.

We are of the view that the learned Judge failed to give due regard to s. 42 of the Contracts Act. The case of *LYL Hooker Sdn. Bhd.* (*supra*) referred to by the learned Judge dealt with the question of novation and assignment. In that case s. 42 of the Contracts Act was not in issue and hence was not considered by the High Court nor by the Federal Court. In the present appeal before us Counsel for the appellant relied strongly on s. 42 of the Contracts Act and we agree with him that by virtue of the appellant's letter of 27 May 1985 the provisions having accepted the performance of the appellant's obligation to pay his debt to them by a third party namely Hock Hin Leong Sdn. Bhd. the respondents were precluded from enforcing the judgments debt against the appellant. The question of assignment and novation therefore did not arise in this case. In the circumstances therefore we held the respondents were not entitled to enforce the default judgments against the appellant. The consequential execution by way of bankruptcy notice and bankruptcy petition was bad and irregular. We accordingly allowed the appeal with costs and set aside the bankruptcy notice and the bankruptcy petition.

On the view that we took in this appeal in relation to s. 42 of the Contracts Act we did not find it necessary to consider the first point taken by the appellant that the sum mentioned in the bankruptcy notice and in the bankruptcy petition was in excess of the actual amount due.

Also found at [1990] 1 CLJ 28